IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

TUESDAY, THE 19TH JUNE 2007 / 29TH JYAISHTA 1929

SA.No. 861 of 1993(C)

AS.87/1990 of II ADDL.DISTRICT COURT,ERNAKULAM
OS.410/1985 of I ADDL.M.C.,ERNAKULAM

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APPELLANT/APPELLANT/PLAINTIFF:

H.BALAKRISHNA KAMMATH, S/O.HARI N KAMMATH,
AUDIO VISUAL TECHNICIAN, RESIDING AT 35/698,
NETTEPADAMROAD, ERNAKULAM COCHIN-16

BY ADV. SRI.R.RAMADAS

RESPONDENTS/RESPONDENTS/DEFENDANTS:

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*1. NARAYANI ALIAS AMMINI, 28/1221 (MEW NO.28/3302)
KADAVANTHARA PADINJAREPURAMPADATHU
PATHANAKKATTU PARAMBU, KADAVANTHARA ROAD
(NOW VALLUVAR ROAD), COCHIN 20
DIED LRS IMPLEADED

2. KANMANI, D/O.NO.1, -DO- -DO-
DELETED FROM THE PARTY ARRAY AS PER ORDER DT.24/9/94
IN CMP 1531/94

3. SIVAN, S/O.NO.1, -DO- -DO-

* IT IS RECORDED THAT R3 IS THE LR OF THE DECEASED R1 AS
PER ORDER DATED 24/9/1994 IN CMP 1530/94

BY ADV. SRI.K.SASIKUMAR

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 19/06/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER ON C.M.P.NO. 1346/99 IN SA 861/99

DISMISSED

19/6/2007

SD/-M.SASIDHARAN NAMBIAR,JUDGE.

//True copy//

PA to Judge.

M.SASIDHARAN NAMBIAR,J.

S.A .NO.861 OF 1993

Dated 19th June 2007

J U D G M E N T

Plaintiff in O.S.410 of 1985 on the file of Additional Munsiff court, Ernakulam is the appellant. Defendants are the respondents. Appellant instituted suit seeking a decree for permanent prohibitory injunction from entering into plaint schedule property or committing any damages or using any portion of the plaint schedule property as a pathway. According to the appellant, respondents are residing in the property lying to the west of the plaint schedule property and it was their kudikidappu property and plaint schedule property was purchased by appellant under Ext.A1 and there was no way through the plaint schedule property to the respondents and respondents have been using pathway through the property of C.M.Joseph and it was surreptitiously shifted further to the south of the property of C.M.Joseph and finding out that respondents are attempting to use a portion of plaint schedule property, appellant sent Ext.A2

lawyer notice on 19/5/1983 directing not to make use of any portion of plaint schedule property and thereafter they stopped making use of the northern portion of plaint schedule property as a way. Alleging that prior to the institution of the suit respondents are attempting to use a portion of plaint schedule property as a way, suit was instituted. Respondents in the written statement admitted the right and title of appellant to the plaint schedule property. They contended that they are owners of 4 cents of property which was purchased under Ext.A4 assignment deed in 1962 and they are residing therein since then and their way from the property is through the northern boundary of plaint schedule property which they have been using openly, uninterruptedly and without obstruction for the last so many years and appellant is not entitled to seek a decree for injunction.

2. Learned Munsiff framed necessary issues. On the evidence of Pws.1 to 3 and Dws.1 and 2 and Exts.A1 to A6, C1 and C1(a) learned Munsiff dismissed the suit holding that respondents have been using the northern portion of the plaint schedule property as a way and therefore case that they attempted to create a new pathway is not correct and so appellant is not entitled

to the decree sought for.

3. Appellant challenged decree and judgment before Sub court, Ernakulam in A.S.87 of 1990. Learned Sub Judge on re-appreciation of evidence confirmed the decree and judgment and dismissed appeal. It is challenged in second appeal. Second appeal was admitted formulating the following substantial question of law.

> Whether in a suit for injunction against the user of plaint schedule property as a pathway by the defendants, was the court correct in refusing to grant decree for injunction, without considering the evidence and entering a finding on the right of way claimed by respondents.

4. Learned counsel appearing for appellant was heard. There was no representation for respondents.

5. Plaint schedule property is having an extent of 17 cents in survey No.712/9 of Kadavanthra village. Right and title of appellant to the plaint schedule property under Ext.A1 assignment deed is not disputed. So also his possession. According to appellant respondents have no right of way through the plaint schedule property and as they are attempting to make use of the northern portion

of the plaint schedule property as a way, they are to be restrained by a decree for permanent prohibitory injunction. Respondents contended that they obtained the property under Ext.A4 sale deed and their property lies to the west of plaint schedule property and they are residing therein and they have been using a way which runs towards north of the property of appellant uninterruptedly and peacefully for the last several years and appellant is not entitled to obstruct the same and therefore appellant is not entitled to decree sought for. Learned Munsiff framed issues regarding the right of way claimed by respondents. Written statement shows that ingredients of right of way by easement of necessity was not pleaded and what was contended was only that there is no other way to the respondents except the disputed way through the northern portion of plaint schedule property to reach their property. There was no pleading that there was a splitting up of the tenement whereunder respondents cannot enjoy the property obtained by them under Ext.A4, except by using a portion of the plaint schedule property as a way. Learned Munsiff did not enter a finding on the right of way claimed by appellant. Though it was found that respondents have been using

portion of plaint schedule property as a way, in spite of the issues framed whether respondents have a right of way either by easement of prescription or easement of necessity, no finding was entered on those issues. When the decree and judgment were challenged before first appellate court, first appellant court also did not enter a finding on the right of way claimed by respondents. When a decree for injunction is sought on the contention that respondents have no right of way and respondents contended that they have a right of way through plaint schedule property, and an issue on whether respondents have right of easement by prescription or right of easement by necessity was framed, courts below should have entered a finding whether respondents have a right of way or not. Without entering a finding on that aspect courts below were not justified in refusing to grant a decree for injunction. If respondents have no right of way either by easement of prescription or by easement of necessity, appellant cannot be claimed the decree as respondents cannot make use of any portion of plaint schedule property as a way. As this aspect was not considered by the courts below there is no other alternative but to set aside the decree and judgment

passed by courts below and remand the suit to the trial court for fresh disposal in accordance with law.

6. Appeal is allowed. Decree and judgment passed by learned Munsiff and confirmed by learned Sub Judge are set aside. O.S.410 of 1985 is remanded to Additional Munsiff court, Ernakulam. Learned Munsiff has to enter a definite finding on issue No.1 whether respondents have a right of way either by easement of prescription or by easement of necessity, before deciding the question whether appellant is entitled to the decree for permanent prohibitory injunction as sought for. Parties are directed to appear before the learned Munsiff on 31/7/2007. Send back the records immediately.

M.SASIDHARAN NAMBIAR,
JUDGE.

uj.

ORDER ON C.M.P.NO.1346/99 IN SA 861/93

DISMISSED

19/6/2007

SD/-M.SASIDHARAN NAMBIAR,JUDGE.

//True copy//

PA to Judge.

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M.SASIDHARAN NAMBIAR,J.

JUDGMENT

S.A.No.861 OF 1993

19th June 2007

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